

CHIT CHI SIANG & ANOR

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v.

THE GOVERNMENT OF MALAYSIA & ANOR

HIGH COURT SABAH & SARAWAK, SANDAKAN

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IAN HC CHIN J

[CIVIL SUIT NO: S21-26-2000]

29 SEPTEMBER 2004

CONTRACT: *Tender - Cancellation of - Whether a breach of agreement - Intention of parties - Whether a binding agreement resulted from tender submitted by plaintiffs and accepted by second defendant - Delay in submitting bank guarantee as performance bond - Whether affected validity of agreement - Whether there was agreement on part of plaintiffs not to pursue legal proceedings - Loss of profit - Damages to be awarded*

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The Sabah Director of Forestry ('the second defendant') on behalf of the government of Malaysia ('the first defendant') had called for tenders for the supply of computers to the Forestry Department, Sandakan. The plaintiffs, trading as Syarikat Sigma computer services, herein participated in the tender exercise and were informed by a letter dated 21 September 1998 that they have been successful in the tender. On 30 September 1998, the plaintiffs confirmed the acceptance of the tender to the first defendant through the second defendant. On 6 October 1998, the plaintiffs deposited with the second defendant a bank guarantee from the Pacific Bank Berhad, Sandakan for the required amount of RM114,740.85 as performance bond for the tender. Pursuant to the acceptance of the tender, the Forestry Department Sandakan by a letter dated 5 October 1998 requested the plaintiffs to supply the computers. The plaintiffs acted upon the request by the Forestry Department by making the necessary orders from the relevant computer suppliers. By a letter dated 14 December 1998, the Acting Director of Forestry Sabah informed the plaintiffs that the first defendant had decided to cancel the tender due to unavoidable circumstances. The plaintiffs hence sued the first and second defendants for RM680,596 being damages for the defendants' breach of an agreement. However, the plaintiffs had conceded that there was no case against the second defendant as the relief sought was only in respect of the first defendant, thus the court dismissed the claim against the second defendant. The issues that arose herein were (1) was there an agreement on the part of the plaintiffs not to pursue legal proceedings against the first defendant; (2) whether a binding agreement resulted from the tender submitted by the plaintiffs which was

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- a* accepted by the second defendant; (3) whether failure to submit the bank guarantee on time affected the validity of the agreement; and (4) whether there was a breach of the agreement.

Held (judgment for the plaintiffs):

- b* [1] The defendants had relied on a letter dated 31 March 1999 in which there was an assertion of a conversation between one Saimah and one Stephen Sen that the plaintiffs would not have any further claim on the matter. Stephen Sen had testified that he did not at anytime say to anyone in the Forestry Department that the plaintiffs would not sue. Saimah, however, was not called to testify. There was nothing from the defendants to contradict him. Further, Stephen Sen could not have made such a promise being merely an employee and in view of the letter of the plaintiffs to the second defendant dated 25 March 1999 which reiterated their right to legal action in no uncertain terms. Therefore, there was no agreement on the part of the plaintiffs not to pursue legal proceedings against the first defendant. (p 58 d-f)
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- e* [2] In this instant case, the three certainties are present, being that the parties, the goods and the price have all been agreed. In fact, the purchase orders (comprising the total value of the accepted tender price) had been issued by the second defendant for the goods to be delivered by the dates stated thereon. This showed the intention of the parties that a binding agreement is to arise upon the acceptance of the tender by the 21 September letter. It makes a stronger case when the 21 September letter itself said that: 'With the acceptance of your tender by the government, you are advised that a binding contract exist between the government and you.' Therefore, a binding agreement resulted from the tender submitted by the plaintiffs which the second defendant accepted by the 21 September letter and which the second defendant acted on by issuing the local purchase orders. (pp 59 g-h & 60 a)
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- g* [3] It was argued that the plaintiffs had failed to comply with the term of the 21 September letter which was that the performance bond must be deposited within two weeks, that is 5 October. However, when the performance bond was presented to the second defendant on 6 October, it was not rejected, neither was it rejected at all at any time. It was not until 14 December that the second defendant wrote to the bank to say that they do not have any claim on the performance bond for the purpose of discharging the plaintiffs from its obligation which again attested to the fact that the defendants had all the while accepted the performance bond though it was given one day late. In fact when the second defendant attempted to rescind the agreement by its letter stating that the installation of the computer network system is to be postponed temporarily, it
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reaffirmed the existence of the concluded agreement and thus reaffirmed the acceptance of the performance bond though given one day late. (p 60 c-e)

[4] The second defendant had terminated the agreement by their 14 December letter and at the same time demanded the return of the local purchase orders. This was clearly in breach of the agreement. This case concerned the setting up of a computer network system for the second defendant which involved principally the supply of hardwares and softwares. The plaintiffs had worked out the costs when competing the tender documents. The plaintiffs had explained in court how those costings had been derived and what the profits would be if they had been allowed to complete the agreement. The court had no reason not to accept the plaintiffs' evidence and that the profit would have been the sum of RM680,596. (pp 60 h & 61 a)

[Judgment for the plaintiffs against the first defendant for the sum of RM680,596 together with statutory interest and costs; the plaintiffs' claim against the second defendant dismissed with costs to the second defendant.]

Case(s) referred to:

Alom Building System Sdn Bhd v. Perspec Prime (M) Sdn Bhd (Suit L22-06-20020) (refd)

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC (refd)

Masters v. Cameron [1954] 91 CLR 353 (refd)

Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC (refd)

Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA (refd)

Winn v. Bull [1877] 7 Ch D 29 (refd)

For the plaintiff - David Wong; M/s Peter Lo & Co

For the 1st defendant - Norliza Yusof DPP

For the 2nd defendant - Halim Hanapia SC

Reported by Suhainah Wahiduddin

JUDGMENT

Ian HC Chin J:

Introduction

The plaintiffs, Chit Chi Siang & Kee Fong Ming @ Ivy Lee trading as Syarikat Sigma Computer Services ("the plaintiffs"), sued the Government of Malaysia ("the 1st defendant") and the Sabah Director of Forestry ("the 2nd defendant") for RM680,596 being damages for the defendants' breach of an agreement. The plaintiff had conceded that there is no case against the 2nd defendant as the relief sought is only in respect of the 1st defendant. I therefore dismiss the claim against the 2nd defendant, reserving the question of costs later.

a Issues

The parties have agreed that the issues for trial are as follows:

(A) Is there a binding agreement between the plaintiffs and the 1st defendant based on the following:

- b** (1) The plaintiffs' participation in the tender exercise with the Forestry Department, Sandakan on 27 July 1998.
- (2) The letter dated 21 September 1998 written by the then Acting Director of Forestry, Sabah informing the plaintiffs that they have been successful in the tender and specifically stating that the acceptance of the tender by the 1st defendant through the Acting Director of Forestry, Sabah.
- c** (3) The letter dated 21 September 1998 requiring the plaintiffs to deposit a performance bond in the form of a bank guarantee for the amount of RM114,740.85 within two (2) weeks from the said letter.
- d** (4) The plaintiffs' confirmation on 30 September 1998 of the acceptance of the tender to the 1st defendant through the 2nd defendant.
- (5) On 6 October 1998, the plaintiffs deposited with the 2nd defendant a bank guarantee no. 50298029 from the Pacific Bank Berhad, Sandakan for the amount of RM114,740.85 as performance bond for the tender.
- e** (6) Pursuant to the acceptance of the tender, the Forestry Department, Sandakan by a letter dated 5 October 1998 requested the plaintiffs to supply computers as listed in the Forestry Department's L.P.O. No. 200992, 200993, 200994, 200995 and 200996 all dated 2 October 1998.
- f** (B) (1) Related to issue (A), whether or not the failure to submit the bank guarantee on time and the failure to submit the tender document to the Setiausaha Lembaga Perolehan Persekutuan Sabah affect the validity of the agreement between the plaintiffs and the 1st defendant?
- g** (2) Was there an agreement on the part of the plaintiffs not to pursue legal proceedings against the 1st defendant?
- h** (C) If there is an agreement between the parties, was there a breach of the same on the part of the 1st defendant?
- (D) If there is a breach what are the damages suffered by the plaintiffs?

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Facts Of Case

The undisputed facts are these, reproducing verbatim what the parties have set out in the agreed statement of facts:

1. On or about July 1998, the 2nd defendant on behalf of the 1st defendant called for tenders for the supply of computers to the Forestry Department, Sandakan. *a*
2. The plaintiffs participated in the tender exercise and submitted their tender to the Forestry Department, Sandakan on 27 July 1998. *b*
3. The plaintiffs were informed by a letter dated 21 September 1998 written by the then Acting Director of Forestry, Sabah informing them that they have been successful in the tender and specifically stated that the acceptance of the tender by the 1st defendant through the Acting Director of Forestry, Sabah constituted a binding contract between the plaintiffs and the 1st defendant. *c*
4. Further, the letter dated 21 September 1998 required the plaintiffs to deposit a performance bond in the form of a bank guarantee for the amount of RM114,740.85 within two (2) weeks from the said letter. *d*
5. The plaintiffs on 30 September 1998 confirmed the acceptance of the tender to the 1st defendant through the 2nd defendant. *e*
6. On 6 October 1998, the plaintiffs deposited with the 2nd defendant a bank guarantee no. 50298029 from the Pacific Bank Berhad, Sandakan for the amount of RM114,740.85 as performance bond for the tender. *f*
7. Pursuant to the acceptance of the tender, the Forestry Department, Sandakan by a letter dated 5 October 1998 requested the plaintiffs to supply computers as listed in the Forestry Department's L.P.O. No. 200992, 200993, 200994, 200995 and 200996 all dated 2 October 1998. *g*
8. The plaintiffs acted upon the request by the Forestry Department's L.P.O.s by making the necessary orders from the relevant computer suppliers. *h*
9. By a letter dated 14 December 1998, the Acting Director of Forestry, Sabah informed the plaintiffs that the 1st defendant had decided to cancel the tender. No reason was given in the letter except that it was due to unavoidable circumstances. *i*
10. The plaintiffs, by a letter dated 22 May 2000 written by their solicitors, M/s Peter Lo & Co. wrote to the Forestry Department, Sandakan for payment of the sum of RM680,596.00 being loss and damages suffered by the plaintiffs. *i*

a The 21 September letter, para. 3, contains the following clause (translated from Malay):

3. With the acceptance of your tender by the government, you are advised that a binding contract exist between the government and you. An official contract will be completed later which includes all the terms of the tender as modified.

b You will be notified by the government when the contract documents are ready for your execution.

By 5 October the plaintiff had received the local purchase orders issued by 2 defendant for various hardware and software to be delivered by 10 November and by January 1999. The plaintiff had pursuant to those orders placed orders with the suppliers which I am inclined to believe was the case as the plaintiff had a dateline, which was 10 November, to meet with regards the delivery to the defendants. Another matter of dispute is whether Stephen Sen, an employee of the plaintiff, had agreed not to pursue legal action against the defendants. The defendants had relied on a letter of 31 March 1999 which the 2nd defendant had through Frederick Kugan issued to the plaintiffs and in which letter was the following assertion:

e 2. However, we wish to reiterate our conversation (Ms Saimah/Mr Stephen Sen) that you have no further claim on this matter. We do sincerely hopes that, it will not reach to this stage.

The “Ms Saimah” referred to in that letter was never called to testify. Anyway, Mr Stephen Sen testified that he did not at anytime say to anyone in the Forestry Department that the plaintiffs would not sue which evidence I accept as the truth since there is nothing from the defendants to contradict him. Not only that, he could not have made such a promise being merely an employee and it is also unlikely that he had made such a promise in view of the letter of the plaintiffs to the 2nd defendant dated 25 March 1999 which reiterated their right to legal action in no uncertain term. Therefore, there was no agreement on the part of the plaintiffs not to pursue legal proceedings against the 1st defendant. That resolves issue B(2). I turn now to the other issues.

g **Was There A Binding Agreement**

The 1st defendant argued that there is no binding contract because the words in the 21 September letter show the parties do not intend that document to give rise to a binding agreement. The 1st defendant argued that it was merely a letter of intent which is an incomplete contract until the terms of a formal contract have been settled and approved by the parties, citing *Winn v. Bull* [1877] 7 Ch D 29. The case cited was referred in numerous Malaysian authorities dealing with the same subject. I am of the view that I need only refer to *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679 to apprise

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myself of the relevant principles of law governing agreement or contract with the term “subject to contract” or with such similar term. There the Court of Appeal cited with approval the following passage in *Masters v. Cameron* [1954] 91 CLR 353 (as did the Federal Court in the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625):

Where the parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

So, even the employment of the term “subject to contract” does not necessarily prevent a binding contract from arising though the final contract was not signed, it is even more unlikely that the term used in the present case, “An official contract will be completed later which includes all the terms of the tender as modified. You will be notified by the government when the contract documents are ready for your execution.” could prevent a binding agreement from arising. The position in this case is this. The three certainties are present, being that the parties, the goods and the price have all been agreed. In fact the purchase orders (comprising the total value of the accepted tender price) had been issued by the 2nd defendant for the goods to be delivered by the dates stated thereon and which I have mentioned earlier. This clearly shows the intention of the parties that a binding agreement is to arise upon the acceptance of the tender by the 21 September letter. It makes even a stronger case when the 21 September letter itself said that: “With the acceptance of your tender by the government, you are advised that a binding contract exist between the government and you.” Therefore, I am of the view that a binding agreement resulted from the tender submitted by the plaintiff which the 2nd defendant accepted by the 21 September letter and which the 2nd defendant

- a* acted on by issuing the local purchase orders. What, then, of the failure of the plaintiff to comply with the term of the 21 September letter which was that the performance bond must be deposited with any bank in Malaysia within two weeks of 21 September, that is by 5 October. The plaintiff only deposited the same on 6 October. The only remark of the 1st defendant on this point is this:
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If the Plaintiff persist that the issuance of P1 (95-97) concludes a binding contract, then certainly the failure of the Plaintiffs to deposit the performance bond within the time limit required by P1 (95-97) was a breach of that contract.

- c* It was not argued that the failure to provide the bond by 5 October prevented a binding contract from arising. When the bond was presented to the 2nd defendant on 6 October, it was not rejected and it was not rejected at all at any time. It was not till 14 December that the 2nd defendant wrote to the bank to say that they do not have any claim on the performance bond for the purpose of discharging the plaintiff from its obligation which again attests to the fact that the defendants had all the while accepted the performance bond though it was given one day late. In fact when the 2nd defendant attempted to rescind the agreement by their letter by stating that the installation of the computer network system is to be postponed temporarily, it reaffirms the existence of the concluded agreement and thus reaffirmed the acceptance of the performance bond though given one day late. Therefore, nothing turns on this one-day delay in the giving of the performance bond.
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Was There A Breach

- f* The 2nd defendant terminated the agreement by their 14 December letter and at the same time demanded the return of the local purchase orders. This is clearly in breach of the agreement. This leaves the question of damages.

Damages

- g* The 1st defendant contended that the plaintiff had failed to prove the loss they have suffered, citing *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 where it is said: "It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail ..." In the matter of proof, the plaintiff had succeeded. This case concerns the setting up of a computer network system for the 2nd defendant which involves principally the supply of hardwares and softwares. The plaintiff had worked out his costs when competing the tender documents. The plaintiffs had through Chit Chi Siang explained in court how those costings had been derived and what the profits would be if they had been allowed to complete the agreement. He explained
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how he got the quotations and prices from his supplier and to which he added his profit to the prices before submitting his tender. He was hardly tested and I have no reason not to accept his evidence that his profit would have been the sum of RM680,596. Therefore, it is a question of the loss of profit and that was the basis on which I would award damages to the plaintiffs, following what I have recently done in the unreported case of *Alom Building System Sdn Bhd v. Perspec Prime (M) Sdn Bhd* (Suit L22-06-20020, dated 7 July 2004).

Conclusion

There will be judgment for the plaintiffs against the 1st defendant for the sum of RM680,596 together with statutory interest and costs. The plaintiffs' claim against the 2nd defendant is dismissed with costs to the 2nd defendant.